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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 72-195

HARRY COLEMAN, doing business as CLUB HI DOLLY,

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA and THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

EVELLE J. YOUNGER
Attorney General of the State of California

FRANK A. IWAMA
Deputy Attorney General
1507 21st Street
Suite 200, Midtown Building
Sacramento, California
Telephone: (916) 445-4090
Attorneys for Respondents

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The decision of the California Department of Alcoholic Beverage Control and the opinion of the California Alcoholic Beverage Control Appeals Board affirming the decision are unreported but are set forth respectively in Appendices "A" and "B" of the Petition for Writ of Certiorari. Petitioner's petition for writ of review (certiorari) was denied by the California Court of Appeal for the Second Appellate District on May 10, 1972, without opinion (See Appendix "C" of the Petition for Writ of Certiorari). Petitioner's petition for hearing was denied by the California Supreme Court on June 7, 1972, without opinion (See

Appendix "D" of the Petition for Writ of Certiorari).

Jurisdiction

The jurisdiction of this Court is invoked under Section 1257(3) of Title 28, United States Code.

Questions Presented

Petitioner alleges in substance (See "Questions Presented" of the Petition for Writ of Certiorari):

1. Is the Alcoholic Beverage Control Act of the State of California unconstitutional insofar as it permits the Department of Alcoholic Beverage Control to revoke a license upon a determination that live entertainment is obscene or is contrary to public welfare or morals after an administrative proceeding without requiring the Department to seek a judicial determination on the subject.
2. Is the power of the Department of Alcoholic Beverage Control to suspend or revoke a license for conduct contrary to public welfare or morals unconstitutionally broad when applied to speech and expression protected by the First Amendment.
3. Was the Department's finding that the events described in the decision were contrary to public welfare or morals supported by evidence sufficient to satisfy the requirements of the First and Fifth Amendments.

Statutes Involved

The pertinent texts of Article XX, Section 22 of the California Constitution and Section 24200(a) of the California Business and Professions Code are set forth in the "Statutory Provisions Involved" of the Petition for Writ of Certiorari.

The text of Sections 23090 through 23090.7 of the California Business and Professions Code is set forth in the Appendix attached hereto.

Statement of the Case

This case involves the State of California's regulation and control of the conditions surrounding the retail sale and consumption of alcoholic beverages on state licensed on-sale[1] alcoholic beverages premises in California under the Twenty-first Amendment to the United States Constitution, under Article XX, Section 22 of the California Constitution, under the California Alcoholic Beverage Control Act (Calif. Bus. & Prof. Code, Div. 9), and under the regulations of the California Department of Alcoholic Beverage Control (Title 4, Calif. Admin. Code).

This case deals more specifically with: (1) the California Department of Alcoholic Beverage Control's constitutional and statutory authority to suspend or revoke alcoholic beverages licenses where the con-

[1] "On-sale" licenses in California authorize the sale and serving of alcoholic beverages to the public for consumption on the licensed premises (such as a bar), as contrasted to "off-sale" licenses authorizing sale of alcoholic beverages to the public for consumption off or away from the licensed premises (such as a package liquor store).

tinuance of the license would be contrary to the public welfare or morals (Art. XX, §22, Calif. Const.; §24200(a), Calif. Bus. & Prof. Code); and (2) the California constitutional and statutory provisions providing for appellate review of California Department of Alcoholic Beverage Control ajudicatory decisions and California Alcoholic Beverage Control Appeals Board appellate opinions by way of petitions for writ of review (certiorari) in the California Supreme Court and the California Court of Appeal (§§23090 through 23090.7, Calif. Bus. & Prof. Code).

On April 5, 1971, an accusation was filed with the California Department of Alcoholic Beverage Control against petitioner's on-sale beer license for "Club Hi Dolly", an establishment located at 12700 South Western Avenue, Los Angeles, California. The accusation charged five separate instances of conduct contrary to public welfare and morals constituting grounds for suspension or revocation of said license under Article XX, Section 22 of the California Constitution and Section 24200(a) of the California Business and Professions Code.

A hearing on the accusation was held on July 28, 1971. On October 28, 1971, the Department filed its decision which found that cause for disciplinary action had been established as alleged and which provided for the revocation of petitioner's alcoholic beverage license (Appendix "A" of the Petition for Writ of Certiorari).

On March 23, 1972, petitioner's appeal from the Department's decision was heard before the California Alcoholic Beverage Control Appeals Board. On April 12, 1972, the Appeals Board issued an opinion affirming the Department's order and decision (Appendix "B" of the Petition for Writ of Certiorari).

On May 10, 1972, the California Court of Appeal for the Second Appellate District denied petitioner's petition for writ of review (certiorari) without opinion (Appendix "C" of the Petition for Writ of Certiorari).

On June 7, 1972, the California Supreme Court denied petitioner's petition for hearing without opinion (Appendix "D" of the Petition for Writ of Certiorari).

ARGUMENT

I. The California Alcoholic Beverage Control Act is Constitutional

A. The California Department of Alcoholic Beverage Control is a State Court of Limited Jurisdiction

Petitioner, citing *Blount* v. *Rizzi*, 400 U.S. 410 (1971), makes the contention that the California Alcoholic Beverage Control Act is unconstitutional because the California procedure does not require the Department to seek judicial review of its administrative determinations.

Before it can be determined whether petitioner's contention is meritorious, a brief review of the California procedure is necessary. First, it must be recognized that the California Department of Alcoholic

Beverage Control is not an administrative agency created by the State Legislature. Rather, it is a California state court of limited jurisdiction, possessing adjudicatory powers with respect to Alcoholic Beverage Control matters. (Art. XX, § 22, Calif. Const.) The fact that the Department is a state constitutional tribunal exercising adjudicatory powers is well settled. See *e.g., Martin* v. *Alcoholic Beverage Control Appeals Board,* 52 Cal.2d 238; 340 P.2d 1 (1959); *Covert* v. *State Board of Equalization,* 29 Cal.2d 125; 173 P. 2d 545 (1946); *Kirby* v. *Superior Court,* 275 Cal.App. 2d 975; 80 Cal.Rptr. 381 (1969); *Department of Alcoholic Beverage Control* v. *Superior Court,* 268 Cal. App.2d 67; 73 Cal.Rptr. 780 (1968); *Francisco Enterprises, Inc.* v. *Kirby,* Case No. C-70 2372, ... F.Supp. . . . . (N.D. Cal. 1971); *Kuzinich* v. *Kirby,* Case No. 72-113, ... F.Supp. . . . . (N.D. Cal. 1971).

It is also important to note that a final adjudicatory decision of the Department may be reviewed by an appeal to the constitutionally created California Alcoholic Beverage Control Appeals Board. Thereafter, the aggrieved party may apply for a writ of review (certiorari) to the California Court of Appeal and the California Supreme Court. Thus, the California procedure provides for appellate review of the Department's judicial determinations. This is particularly so in view of the fact that the Department is itself a state court of limited jurisdiction and not a legislatively created state administrative agency.

Furthermore, petitioner's reliance on the *Blount* case is misplaced. *Blount* involved the issue of governmental censorship and the possible curtailment of constitutionally protected speech within the First Amendment. The present case focuses on the licensing powers of a state over the retail sale and consumption of alcoholic beverages on state licensed premises. The Department's action was not based on the issue of obscenity or speech protected by the First Amendment, but rather its licensing power to regulate and control the sale of alcoholic beverages within the State of California. In this respect, both traditionally [2] and under the Twenty-first Amendment,[3] the power of a state to regulate and control alcoholic beverages destined for use, distribution or consumption within its borders—including seizure or complete prohibition as well as any restriction falling short of prohibition even if discriminatory in nature—has been almost unconditional.

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[2] *Mugler* v. *Kansas*, 123 U.S. 623, 657–671 (1887); *Crowley* v. *Christensen*, 137 U.S. 86, 91 (1890); *Giozza* v. *Tiernan*, 148 U.S. 657, 661–662 (1893); *Cronin* v. *Adams*, 192 U.S. 108, 114–115 (1904); *Cox* v. *Texas*, 202 U.S. 446, 451 (1906); *Purity Extract Co.* v. *Lynch*, 226 U.S. 192, 201 (1912); *Seaboard Air Line Ry.* v. *North Carolina*, 245 U.S. 298 (1917); *Crane* v. *Campbell*, 245 U.S. 304, 307 (1917); *McCormick & Co.* v. *Brown*, 286 U.S. 131, 140–141 (1932).

[3] *State Board of Equalization* v. *Young's Market*, 299 U.S. 58, 63–64 (1936); *Mahoney* v. *Triner Corp.*, 304 U.S. 401 (1938); *Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Commission*, 305 U.S. 391, 394 (1939); *Ziffrin* v. *Reeves*, 308 U.S. 132, 138 (1939); *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945).

II. The Authority of the California Department of Alcoholic Beverage Control to Regulate Conduct Which is Contrary to Public Welfare or Morals is Constitutional and is Properly the Subject of Disciplinary Action Even in the Absence of Proof of Obscenity.

A. The Non-Verbal Acts and Conduct Engaged in by Petitioner's Employees Were Not "Dances" or "Speech" and Therefore Were Not Within or Entitled to First Amendment Protection.

While the First Amendment protection has been expanded to encompass certain non-verbal acts and conduct engaged in by persons for the purpose of expressing an idea ("symbolic speech"),[4] this does not mean that any and all non-verbal acts and conduct which allegedly are engaged in with the intent of expressing an idea are automatically "speech" and within the protection of the First Amendment. In *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968), this Court stated:

> "O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected 'symbolic speech' within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of 'communication of ideas by conduct,' and that his conduct is within this defi-

[4] *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969) (march against school segregation); *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969) (wearing black armbands in protest against government policy); *Hughes* v. *Superior Court of California*, 339 U.S. 460 (1950) (picketing); *Stromberg* v. *California*, 283 U.S. 359 (1931) (display of flag); and see *United States* v. *O'Brien*, 368 U.S. 367 (1968) (draft card burning) wherein it was assumed that the purported communicative element of O'Brien's conduct (protest against war and draft) was sufficient to bring the First Amendment into play. 391 U.S. at 376.

nition because he did it in 'demonstration against the war and against the draft."

"We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." (Emphasis added.)

Without attempting to speculate as to what, *if any,* idea or protest petitioner's female employees were attempting to express to the patrons by touching and exposing their vaginal areas, by exposing their anuses, by simulating sexual intercourse, by placing cigars and cigarettes into their vaginas, and by moving items of United States currency over their pubic areas, it is submitted that such non-verbal acts and conduct have no intrinsic or clearly recognizable and significant communicative or "symbolic speech" element entitling them to First Amendment protection.

B. The Acts for Which the State May Discipline Licensed Premises Are Not Restricted to Obscene Conduct.

Assuming, arguendo, that the non-verbal acts and conduct engaged in by petitioner's employees are within the First Amendment protection, obscenity is not the only basis upon which a state may regulate or limit First Amendment activity.[5] Petitioner, however,

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[5] *Hughes* v. *Superior Court of California*, 339 U.S. 460 (1950) and *International Brotherhood of Teamsters* v. *Hanke*, 339 U.S. 470 (1950) (picketing); *Beauharnis* v. *Illinois*, 343 U.S. 250 (1952) (libel); *United States* v. *Harris*, 347 U.S. 612 (1954) (lobbying); *Beard* v. *Alexandria*, 341 U.S. 622 (1951) (door-to-door soliciting); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (sound trucks), *United States* v. *O'Brien*, 391 U.S. 367 (1968) (draft card burning); and see *Adderley* v. *Florida*, 385 U.S. 39, 47–48 (1966), and *Purity Extract Co.* v. *Lynch*, 226 U.S. 192, 201 (1912).

cites *La Rue* v. *State of California,* 326 F.Supp. 348 (C.D. Cal. 1971), for the proposition that the Department's rules must conform to the constitutional standards for the regulation of obscenity and that the state could not control entertainment on a standard of public welfare and morals. It is submitted, as was our position on the appeal in *La Rue* before this Court, that the District Court's opinion in that case is clearly erroneous when considered in light of the existing law. (*California* v. *La Rue,* Case No. 71-36 (October Term, 1971).)

Furthermore, petitioner's reliance on the obscenity standard expressed in *Roth* v. *United States,* 354 U.S. 476 (1957), and *In re Giannini,* 69 Cal.2d 563; 446 P.2d 535 (1968), and their progeny is similarly misplaced in that those cases involved criminal prosecutions for violations of criminal obscenity statutes. The present case, on the other hand, is not based on violations of any criminal statute, does not constitute a criminal proceeding, and does not involve obscenity. *Yakov* v. *Board of Medical Examiners,* 68 Cal.2d 67; 435 P.2d 553 (1968). Rather, the present case is civil in nature and does not entail criminal punishment, but instead involves disciplinary action against alcoholic beverage license privileges.

The California Supreme Court in *Boreta Enterprises, Inc.* v. *Department of Alcoholic Beverage Control,* 2 Cal.3d 85; 465 P.2d 1 (1970), has assured that the power of the Department to regulate conduct contrary to public morality will not be applied in a sweep-

ing and improper manner by requiring the question of public morality to be proved as any other fact at trial, unless the conduct involved is *per se* contrary to public morality. The court announced that the Department may revoke a license "for good cause" and that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determing what is contrary to public welfare or morals. Further, the court expressly stated that certain conduct could be contrary to public morals *per se*:

> "There may be cases in which the conduct at issue is so extreme that the Department could conclude that it is per se contrary to *public* morals. By this we mean that it is so vile and its impact upon society is so corruptive, that it can be almost immediately repudiated as being contrary to the standards of morality generally accepted by the community after a proper balance is struck between personal freedom and social restraint." (*Boreta Enterprises, Inc.* v. *Department of Alcoholic Beverage Control, supra,* 2 Cal.3d at 101; 465 P.2d at 12.)

It is submitted that the conduct and acts which were found to have been committed by petitioner's employees on the licensed premises were of such a vulgar and vile nature as to constitute prohibited conduct within the purview of the disciplinary powers of the Department.

III. The Decision of the California Department of Alcoholic Beverage Control is Supported by Substantial Evidence.

A review of the facts in the present case reveals that the Department's decision is supported by substantial evidence. The decision makes findings of fact in detail as to the numerous improper acts which were engaged in by petitioner's employees on the licensed alcoholic beverage premises. Among the conduct which occurred included nude performances by female employees displaying and touching their genitalia, exposing their anuses, simulating sexual intercourse, placing cigars and cigarettes in their vaginal orfices, and moving items of United States currency over their pubic areas.

It is submitted that the Department's decision, which found and determined that petitioner permitted his employees to engage in acts contrary to the public welfare and morals on state licensed on-sale alcoholic beverage premises, was fully supported by the evidence in the case.

Conclusion

For the foregoing reasons, it is respectfully requested that the petition for writ of certiorari be denied.

Dated: November 13, 1972.

EVELLE J. YOUNGER
Attorney General of the
State of California

FRANK A. IWAMA
Deputy Attorney General
Attorneys for Respondents.

APPENDIX

Sections 23090 through 23090.7 of the California Business and Professions Code provides:

"23090. Any person affected by a final order of the board, including the department, may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of such final order. The application for writ of review shall be made within 30 days after filing of the final order of the board.

"23090.1. The writ of review shall be made returnable at a time and place then or thereafter specified by court order and shall direct the board to certify the whole record of the department in the case to the court within the time specified. No new or additional evidence shall be introduced in such court, but the cause shall be heard on the whole record of the department as certified to by the board.

"23090.2. The review by the court shall not extend further than to determine, based on the whole record of the department as certified by the board, whether:

"(a) The department has proceeded without or in excess of its jurisdiction.

"(b) The department has proceeded in the manner required by law.

"(c) The decision of the department is supported by the findings.

"(d) The findings in the department's decision are supported by substantial evidence in the light of the whole record.

"(e) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

"Nothing in this article shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence.

"§23090.3. The findings and conclusions of the department on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department. The board, the department, and each party to the action or proceeding before the board shall have the right to appear in the review proceeding. Following the hearing, the court shall enter judgment either affirming or reversing the decision of the department, or the court may remand the case for further proceedings before or reconsideration by the department.

"23090.4. The provisions of the Code of Civil Procedure relating to writs of review shall, insofar as applicable, apply to proceedings in the courts as provided by this article. A copy of every pleading filed pursuant to this article shall be served on the board, the department, and on each party who entered an appearance before the board.

"23090.5. No court of this state, except the Supreme Court and the courts of appeal to the extent specified in this article, shall have jurisdiction to review, affirm, reverse, correct, or annul any order, rule, or decision of the department or to suspend, stay, or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the department in the performance of it duties, but a writ of

mandate shall lie from the Supreme Court or the courts of appeal in any proper case.

"23090.6. The filing of a petition for, or the pendency of, a writ of review shall not of itself stay or suspend the operation of any order, rule, or decision of the department, but the court before which the petition is filed may stay or suspend, in whole or in part, the operation of the order, rule, or decision of the department subject to review, upon the terms and conditions which it by order directs.

"23090.7. No decision of the department which has been appealed to the board and no final order of the board shall become effective during the period in which application may be made for a writ of review, as provided by Section 23090."

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